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# Supreme Court of the United States

October Term — 1949

**No. 504**

UNITED STATES NATIONAL BANK OF DENVER and HILDRED L. DUGAN, as Executors of the Estate of George P. Dickey, Deceased, *Petitioners,*

*versus*

RUBY DICKEY BARTGES, *Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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20 January 1950

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## SUBJECT INDEX


| | PAGE |
|---|---|
| A. Opinions Below | 1 |
| B. Jurisdiction | 2 |
| C. Statement of the Case | 3 |
| D. Summary of Argument | 8 |
| E. Argument and Authorities | 9 |
| I. The Decree Below Is Not Final Since It Remands the Case to the District Court For Judicial Determination of Plaintiff's Damages | 9 |
| II. The Colorado Supreme Court Did Not Deny "Full Faith and Credit" to the Kansas Divorce Decree | 14 |
| F. Conclusion | 21 |


## INDEX TO AUTHORITIES

**Cases:**


| | PAGE |
|---|---|
| Bruce v. Tobin, 245 U.S. 18, 62 L. ed. 123 | 11, 12 |
| California National Bank v. Stateler, 171 U.S. 447, 43 L. ed. 233 | 11 |
| Catlin v. United States, 324 U.S. 229, 89 L. ed. 911 | 11 |
| Cessna v. Cessna, 155 Kan. 856, 130 P. (2d) 560 | 19 |
| Cummings v. Cummings, 138 Kan. 359, 26 P. (2d) 440 | 19 |
| Davis v. Crouch, 94 U.S. 514, 24 L. ed. 281 | 11, 13 |
| Davison v. Davison, 125 Kan. 807, 266 Pac. 650 | 19 |

## INDEX TO AUTHORITIES (Cont'd.)


PAGE

Drake v. Kochersperger, 170 U.S. 303, 42 L. ed. 1046 ..... 11

Folansbee v. Ballard Paving Co., 154 U.S. 651, 25 L. ed. 802 ..... 11

Gospel Army v. Los Angeles, 331 U.S. 543, 91 L. ed. 1662 ..... 9

Grant v. Life Ins. Co., 106 U.S. 429, 27 L. ed. 237 11

Hoard v. James, 119 Kan. 138, 237 Pac. 888 ..... 19

Holder v. Holder, 143 Kan. 79, 53 P. (2d) 806 .... 19, 20

Hullet v. Hullet, 133 Kan. 738, 3 P. (2d) 470 ..... 16

Hyde v. Hyde, 143 Kan. 660, 56 P. (2d) 437; *id.*, 147 Kan. 134, 75 P. (2d) 1023 ..... 15

Lacelede Gas Light Co. v. Public Service Comm., 304 U.S. 398, 82 L. ed. 1422 ..... 11

Leach v. Leach, 46 Kan. 724, 27 Pac. 131 ..... 14

Leslie v Manufacturing Co., 102 Kan. 159, 169 Pac. 193 ..... 15

Lodge v. Twell, 135 U.S. 232, 34 L. ed. 153 ..... 11

Magnolia Petroleum Company v. Hunt, 320 U.S. 430, 88 L. ed. 149 ..... 17

Mann v. Mann, 136 Kan. 331, 15 P. (2d) 478 ..... 20

Mann v. Mann, 135 Okla. 211, 275 Pac. 348 ..... 19

Martinez v. International Banking Corp., 220 U.S. 214, 55 L. ed. 438 ..... 11

Mississippi Central Railroad Co. v. Smith, 295 U. S. 718, 79 L. ed. 1673 ..... 11

## INDEX TO AUTHORITIES (Cont'd.)


| | PAGE |
|---|---|
| Montgomery v. Anderson, 62 U.S. 386, 16 L. ed. 160 | 11 |
| Newton v. Consolidated Gas Co., 265 U.S. 78, 68 L. ed. 909 | 13 |
| North Carolina R. Co. v. Swasey, 90 U.S. 405, 23 L. ed. 136 | 11 |
| Pattison v. Pattison, 129 Kan. 558, 283 Pac. 483 | 19 |
| Perkins v. Perkins, 154 Kan. 73, 114 P. (2d) 804 | 15 |
| Petty v. Petty, 147 Kan. 342, 76 P. (2d) 850; *id.*, 167 Kan. 510, 207 P. (2d) 428 | 15, 16 |
| Putnam v. Putnam, 102 Kan. 47, 177 Pac. 838 | 19 |
| Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 92 L. ed. 1212 | 11, 12 |
| Schoonover v. Schoonover, 172 F. (2d) 526 (C. C.A. 10) | 16 |
| Shaffer v. Shaffer, 135 Kan. 35, 10 P. (2d) 17 | 15, 19 |
| Tobin v. Tobin, 89 Okla. 12, 213 Pac. 884 | 19 |
| Union Mutual Life Ins. Co. v. Kirchoff, 160 U.S. 374, 40 L. ed. 461 | 11 |
| Washington ex rel. Grays H. L. Co. v. Superior Court, 243 U.S. 251, 61 L. ed. 702 | 11 |
| Watson v. Watson, 104 Kan. 578, 180 Pac. 242 | 19 |
| **Statutes:** | |
| Title 28, United States Code, Section 1257 | 9 |
| G. S. Kan. 1947 Supp., 60-1511 | 19 |
| 12 Okla. Stats. Ann. §1278, p. 179 | 19 |

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*versus*

RUBY DICKEY BARTGES, *Respondent.*

---

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

Your Respondent, Ruby Dickey Bartges, in opposition to the petition for writ of certiorari and supporting brief, respectfully shows to this Honorable Court:

### A.

### OPINIONS BELOW

The opinion of the District Court of Denver, County, Colorado is shown at pages 73-95 of the Record. It is not reported.

The opinion of the Colorado Supreme Court, rendered 14 July 1949, is not yet officially reported. Unofficially it is reported in 210 P. (2d) 600 (Advance Sheet), and appears at pages 420-444 of the record herein. Per curiam opinion denying petition for rehearing is unreported, but appears at page 491 of the record.

## B.

## JURISDICTION

Petitioners seek to invoke this Court's jurisdiction under Title 28, United States Code, Section 1257 (3). The decree of the Colorado Supreme Court was rendered on 14 July 1949. Timely petition for rehearing was denied on 3 October 1949. Petition for writ of certiorari was filed on 28 December 1949.

## C.

## STATEMENT OF THE CASE

This was an action by Respondent, Ruby Dickey Bartges, against her divorced husband, George P. Dickey (Petitioners' predecessor), to recover damages sustained by virtue of a property settlment contract, executed by the parties during the pendency of their divorce suit, under which she received a grossly inequitable division of jointly accumulated marital property. Respondent premised her right of recovery not only upon express fraud (affirmative misrepresentations by Mr. Dickey concerning the extent and value of the marital property which was the subject matter of the contractual negotiations), but also upon constructive or "extrinsic" fraud (nonperformance of her husband's affirmative duty to make full and complete disclosure to her of the extent and value of the marital property)—see, e. g., Colorado Supreme Court opinion, R. 435-437. The basic facts essential to an understanding of the controversy are as follows:

Respondent and George P. Dickey were married in 1924 (R. 73). She bore Dickey three children, one of

whom died, and also raised for Dickey another child of his by a previous marriage (R. 73). Their marriage lasted approximately nineteen years—until 7 February 1944 (R. 9). Although Dickey was "an excessive drinker and abusive in his conduct towards his wife" (R. 82), Respondent was "a true and faithful wife up until a period shortly before the institution of the divorce action" (R. 82).

At the time of their marriage Dickey had no property of any value (R. 79). In fact, when their first child was born in June, 1926 (R. 157), he was unable to discharge the medical and hospital bills (R. 153). And in the spring of 1927 friends "took up a collection to pay the gas, water and light bills and buy some food, and also buy Mrs. Dickey some clothes. She had two wash dresses" (R. 157). By the time of their divorce, however, the marital partnership had accumulated assets worth between five and six million dollars (R. 79). Under Kansas law Respondent was entitled, in event of divorce, to a fair and equitable division of this jointly accumulated property (e. g., see Colorado Supreme Court opinion, R. 428-429).

Respondent instituted her suit for divorce in the District Court of Sedgwick County, Kansas, the state of the parties' residence, in October, 1943 (R. 73). Thereupon her counsel, Mr. Foulston, met with Dickey's counsel, Messrs. Pringle and Fleeson, in an attempt to negotiate a property settlement (R. 170-171). By Kansas law Dickey was obligated to exercise utmost good faith towards Respondent in those negotiations and to make full and complete disclosure to her of the extent and value of the marital property (see e. g., Colorado Supreme Court opinion, R. 438-439). At the first conference of attorneys Mr. Foulston demanded a full disclosure by Dickey with

respect to the marital assets (R. 171), and Mr. Fleeson agreed to furnish the requisite information (R. 171, 319). Mr. Pringle then requested one Bonicamp, Dickey's accountant, to prepare such a statement for Mr. Foulston (R. 319). Bonicamp did prepare certain "balance sheets" (being Exhibit "B" to Respondent's instant complaint, R. 17-24) pursuant to this request (R. 335-336, 357-358). But those balance sheets did not identify any specific property owned by Dickey. Moreover, they did not show values; instead, they merely listed investment costs (R. 74). And this was the *only* disclosure made by Dickey to Respondent regarding the extent and value of the marital estate (R. 174, 216-217, 322-323, 334).

When Bonicamp handed the "balance sheets" to Dickey and his attorneys he advised them that because of "discovery and production" in the West Edmond, Oklahoma, oil pool the books and "balance sheets" did not reflect values, and he told them "they should explain that to whom it (the 'balance sheet') was delivered to" (R.336-337). No such explanation was ever made. Neither Respondent nor her counsel knew Dickey had any interest in the West Edmond pool (e. g., R. 197, 198, 217, 219-220, 234-235, 237), notwithstanding this pool was supplying fifteen to twenty percent of Dickey's income (R. 363-364) and was constantly increasing in value (R. 257).

In short, there was no evidence adduced to show Respondent or her counsel knew or were given any information regarding the extent and value of the Dickey marital property; and there was an abundance of testimony to show they did *not* possess this vital knowledge (e. g., R. 175, 197, 198, 217, 219-220, 234-235, 237). In this connection, when, at inception of the settlement negotiations, Respondent's counsel speculated that Dickey might be worth approximately five million dollars, Dickey's

counsel Mr. Pringle asserted that figure was "clear out of line" (R. 171) and that "maybe" Dickey was worth as much as $2,500.00 (R. 173). Settlement was negotiated in reliance upon this statement by Dickey's attorney (R. 224, 226, 229), and a property settlement agreement was executed by both parties on 7 February 1944 (Exhibit "C" to instant complaint, R. 25-34). By that agreement Respondent received $75,000 in cash (most of which was required to discharge existing debts —R. 166) and $250,000 in trust under an arrangement providing for the payment of $550 per month to her for her life, with the corpus passing to the two children upon her death (R. 74-75). At the same time, she forfeited all interest in a prior $250,000 trust irrevocably established for her in 1941 but which terminated in event of divorce (R. 83,242; Abst. Ex. 41).

After the settlement was signed, an abbreviated hearing was held in the Kansas divorce court. Dickey withdrew both his answer and his cross petition (R. 9), and Respondent introduced evidence pertaining to, but only to, her right to a divorce (R. 10, 179-180; see Colorado Supreme Court opinion, R. 424). Thereupon the settlement contract was submitted to the court for its "approval" (*id*). But there was no evidence whatever introduced as to the extent or value of the Dickey's marital estate, so the court had no possible means of considering or determining whether the amount awarded to Respondent by the contract was or was not "fair and equitable" (*id.*). No issue of fraud, affirmative or constructive, was raised by the pleadings or passed upon by the court (*id.*; also, Colorado Supreme Court opinion, R. 430, 433). Finally, under Kansas law the agreement was absolutely binding upon the divorce court absent any complaint there levelled against it by the parties, and the court lacked juris-

diction to disapprove or modify the contract (e. g., see Colorado Supreme Court opinion, R. 430-433). At the conclusion of the hearing the Kansas court granted Respondent a divorce from Dickey and accorded its perfunctory, meaningless "approval" to the settlement agreement (R. 9-17), the decree being rendered on 7 February 1944 (R. 9).

Almost immediately thereafter Respondent and Dickey both left Kansas and took up permanent residences in Colorado, she in Pueblo and Dickey in Denver. (R. 75). Eight months later Stanolind Oil and Gas Company purchased the stock of the Dickey Oil Company (part of the marital property involved in the settlement agreement) for $6,260,000 plus $300,000 escrowed to cover income tax contingencies (Request No. 16 for Admissions, R. 64; Answer No. 16, R. 70). Information concerning such sale thereafter coming to Respondent's attention (R. 255), and realizing she had been defrauded and uninformed at the time of her property settlement, Respondent filed her instant action against Dickey in the District Court of Denver County, Colorado, on 18 September 1945 (R. 2). Dickey died on 20 February 1946, during the pendency of the action (R. 36), and Petitioners were appointed executors of Dickey's estate on 15 April 1946 and were substituted herein as parties defendant on 8 July 1946 (R. 41).

Respondent's instant action did not attack the Kansas divorce decree. Instead, it sought recovery of damages caused by the fradulently induced property settlement agreement—which agreement, as will hereinafter be demonstrated, was not adjudicated by and did not merge into the decree of divorce (e. g., see Colorado Supreme Court opinion, R. 430-433). Petitioners, however, asserted throughout that to award Respondent relief herein

would constitute a denial of full faith and credit, under Article IV of the federal constitution, to the Kansas judgment (e. g., R. 59-60). The trial court rejected this contention, found Dickey had been guilty of "extrinsic" fraud, and ordered Petitioners to place in trust a sum sufficient to pay Respondent $450.00 per month for life (R. 73-95).

Petitioners and Respondent both appealed from this decree to the Supreme Court of Colorado, Respondent specifying, *inter alia*, that the trial court erred in not awarding her an outright money judgment (Specification 5, R. 419) *and in granting her a grossly inadequate amount* (Specification 7, R. 419-420).

The Colorado Supreme Court, after carefully reviewing the pertinent Kansas decisions, determined that the Kansas divorce decree posed no bar to maintenance of an action such as Respondent's, either in Kansas or in Colorado (R. 428-434). It determined, further, that by Kansas law Dickey was, at the time of the property settlement negotiations, obligated fully and completely to disclose to Respondent the extent and value of the marital assets; also, that Kansas law raises a presumption of concealment and overreaching ("constructive fraud") when a property settlement agreement contains an inadequate allowance to the wife. (R. 437-439). Finally, the Colorado Supreme Court determined that there was an abundance of evidence to support the trial court's finding that Dickey was guilty of the "constructive" or "extrinsic" fraud of nondisclosure (R. 437, 439). Accordingly, it affirmed the decision of the trial court insofar, but only insofar, as it sustained Respondent's right to recover damages (R. 444). But it upheld Respondent's contention and reversed the decree below with respect to the relief awarded, remanding the cause with two directions: (1)

*that the trial court consider and determine the amount of damages to which Respondent is entitled*, and (2) that it then render judgment for that amount in a lump sum and not in trust:

> "The cause is remanded with directions to enter a money judgment for such sum as shall be determined by the court, from the evidence heard upon the trial, as will result in a fair and equitable division of property as required under Kansas law." (R. 444)

It is this decree, nonfinal upon its face, which Petitioners ask this Court to review upon certiorari.

## D.

## SUMMARY OF ARGUMENT

1. Respondent's right of recovery and the quantum of damages to which she is entitled are inseparable, component parts of her single cause of action. The decree of the Colorado Supreme Court has not finally terminated the litigation below because, although it adjudicates plaintiff's right of recovery, it remands the cause to the district court for judicial determination of Respondent's damages—no mere ministerial act. Manifestly, therefore, the decree is not "final" within Section 1257 of the Code. By the same token, certiorari may not issue.

2. Under Kansas law the settlement contract was absolutely binding upon the Kansas divorce court since neither litigant there pleaded or otherwise raised any issue as to its validity. It could not have disapproved, set aside, or modified the contract even had it so desired. Accordingly, by Kansas law the court's perfunctory approval thereof was no adjudication of its validity nor did it cause the agreement to become merged in the divorce decree. Again, no evidence was introduced before the

Kansas divorce court regarding the extent or value of the Dickeys' marital assets, so that court could not and did not judicially inquire into, determine, or adjudicate even the adequacy of the provision which the contract made for Respondent. Finally, whether Dickey was guilty of the constructive fraud of nondisclosure was neither raised in nor determined by the Kansas court. It follows that in permitting Respondent to maintain her instant action to recover damages for constructive fraud the Colorado court accorded to the Kansas divorce decree exactly the same credit it would have received had this suit been instituted in Kansas. The constitutional mandate of "full faith and credit" has not, therefore, been transgressed.

## E.

## ARGUMENT AND AUTHORITIES

### I.

**The Decree Below Is Not Final Since It Remands the Case to the District Court For Judicial Determination of Plaintiff's Damages.**

Title 28, United States Code, Section 1257, invests this Court with jurisdiction to review, by appeal or certiorari, only:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had. . ."

To be "final", and, hence, reviewable by this Court, a decree must fully terminate the litigation, determine all rights of the parties, and leave nothing to be done except the ministerial act of entering judgment in accordance with the decree. For example, see *Gospel Army v. Los Angeles*, 331 U. S. 543, 546, 91 L. ed. 1662, 1665:

> "Under §237 of the Judicial Code, 28 USCA §344, 8 FCA Title 28, §344, only 'final judgments' of state courts may be appealed to this court. And it frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court . . . directed.' *Department of Banking v. Pink*, 317 US 264, 267, 62 L ed 123, 38 S Ct 7."

The decree below cannot satisfy this rudimentary test. It does not end the litigation or determine all of Respondent's rights and Petitioners' liability. Instead, it requires the trial court to exercise its judicial discretion of determining the amount of damages to which Respondent is entitled. Unarguably this is no "mere ministerial duty . . . to mathematically compute the amount to be paid the Respondent" as Petitioners blandly assert (Pet. for Cert. 49). The decree is *not* that Respondent be awarded outright the same amount of money which the Colorado trial court originally ordered to be placed in trust. On the contrary, the trial court is ordered:

> " . . . to enter a money judgment for such sum as shall be [not for such sum as has been been] determined by the court, from the evidence heard upon the trial, as will result in a fair and equitable division of property required under Kansas law." (R. 444)

In fine, the trial court is directed to reconsider the damage issue, to arrive at a judicial determination of a fair and equitable award to Respondent, and then, and only then, to enter judgment accordingly.

It is well settled that under these circumstances the decree below, which does not resolve the damage issue, is not "final": *Republic Natural Gas Co. v. Oklahoma,* 334 U. S. 62, 92 L. ed. 1212; *Catlin v. United States,* 324, U.S. 229, 233, 89 L. ed. 911, 916; *Lacelede Gas Light Co. v. Public Service Comm.*, 304 U. S. 398, 82 L. ed 1422; *Mississippi Central Railroad Co. v. Smith,* 295 U. S. 718, 79 L. ed. 167; *Bruce v. Tobin,* 245 U. S. 18, 62 L. ed. 123; *Washington ex rel. Grays H. L. Co. v. Superior Court,* 243 U. S. 251, 61 L. ed. 702; *Martinez v. International Banking Corp.,* 220 U. S. 214, 55 L. ed. 438; *California National Bank v. Stateler,* 171 U. S. 447, 43 L. ed. 233; *Drake v. Kochersperger,* 170 U. S. 303, 42 L. ed. 1046; *Union Mutual Life Ins. Co. v. Kirchoff,* 160 U. S. 374, 40 L. ed. 461; *Lodge v. Twell,* 135 U. S. 232, 34 L. ed. 153; *Grant v. Life Ins. Co.*, 106 U. S. 429, 27 L. ed. 237; *Follansbee v. Ballard Paving Co.,* 154 U. S. 651, 25 L. ed. 802; *Davis v. Crouch,* 94 U. S. 514, 24 L. ed. 281; *North Carolina R. Co. v. Swasey,* 90 U. S. 405, 23 L. ed. 136; *Montgomery v. Anderson,* 62 U. S. 386, 16 L. ed. 160.

Strikingly illustrative of this principle in *Mississippi Central Railroad Co. v. Smith, supra,* 295, U.S. 718, one of countless memorandum decisions by this Court applying the rule under consideration. There, Appellee brought suit against Appellant railroad in a Mississippi state court to recover damages sustained in a collision between his automobile and Appellant's train. Judgment was entered for Appellee upon a jury's verdict which awarded him $11,000. On appeal to the Mississippi Supreme Court the railroad contended certain instructions to the jury under the Mississippi "whistle and bell statute" violated the equal protection and due process clauses of the federal constitution. That court rejected the constitutional

contention and affirmed the judgment save as to amount. It ordered that judgment be entered for $7,000 if Appellee would accept a remittitur of $4,000; "otherwise, it will be reversed . . . and the cause remanded for trial on the question of the amount of damages only" (159 So. 562). An attempted appeal therefrom to this Court was dismissed upon the ground that the Mississippi Supreme Court decree was not "final" since it did not determine the damage feature of the case.

There is no merit to instant Petitioners' contention (Pet. for Cert. 49) that because the "constitutional question" has been adjudicated by the Colorado Supreme Court its decree is final notwithstanding the fact that the cause is remanded to the Colorado trial court for redetermination of the damage feature. Each of the authorities immediately hereinbefore cited constitutes a complete refutation of that position.

Thus, see *Bruce v. Tobin, supra*, 245 U. S. 18, a leading decision upon this very point, where an identical contention was repudiated in these words:

> "It may be indeed said that although the case was remanded by the court below for a new trial, the action of the court was in a sense final because it determined the ultimate right of the father to recover and the general principles by which that right was to be measured. But that contention is not open . . . " (p. 19)

To the same effect is this Court's recent, analogous opinion in *Republic Natural Gas Co. v. Oklahoma, supra*, 334 U.S. 62, 68:

> "Thus, the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to

be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages."

Finally, it is of no moment that the Colorado Supreme Court decree taxed the costs of the appeal to Petitioners (e. g., see *Davis v. Crouch, supra,* 94 U. S. 514). Were the rule otherwise nearly all state supreme court decrees —including, even, those disposing of appeals from mere interlocutory rulings upon motions and demurrers— would be final and reviewable inasmuch as appellate decrees invariably assess the costs of the appeal to the unsuccessful litigant.

*Newton v. Consolidated Gas Co.*, 265 U. S. 78, 68 L. ed. 909 (1924), the single authority adduced by Petitioners for their novel contention (Pet. for Cert. 50), is patently irrelevant. There, Appellee gas company secured an injunction against enforcement of a New York statute fixing, at a confiscatory rate, the price at which the company might supply gas to its private customers. Thereafter a controversy arose in the district court with respect to costs. The district court assessed to Appellant the cost ($76,086.50) paid by Appellee gas company to a surety company for bonds to secure repayment of money impounded with a special master during the trial of the injunction suit. Appeal to this Court was perfected from, and only from, the final order taxing such costs to Appellant.

The primary issue posed by the *Newton case* was not whether a judgment assessing costs is final, but whether a final judgment assessing costs is appealable. And on the former issue the order was considered final not because it related to "costs", but because it terminated the litigation, leaving nothing further to be decided:

> "If the subject-matter is appealable at all, there would seem to be no doubt that the decree has all the characteristics of finality. An execution can issue at once to collect the costs as taxed, including the item here complained of." (265 U. S. at 82; 68 L. ed. at 910)

At all events assuredly this Court did not there hold that a decree, otherwise nonfinal, intermediary, or interlocutory, must nevertheless be held "final" merely because it includes an order taxing appellate costs to one of the litigants.

We submit that, beyond all doubt, the Colorado Supreme Court decree is not "final" and that the petition for certiorari must be dismissed.

## II.

### The Colorado Supreme Court Did Not Deny "Full Faith and Credit" to the Kansas Divorce Decree.

As hereinbefore pointed out, the issue of fraud (affirmative or constructive) in Dickey's procurement of the property settlement contract was not within the pleadings filed in the Kansas divorce suit, and no such issue was considered or adjudicated by the District Court of Sedgwick County, Kansas, in the divorce action (R. 9-17, 179-180; see Colorado Supreme Court opinion, R. 430, 433). Therefore, unless Respondent's rights with respect to the Dickey marital property were adjudicated by the divorce court so as to become merged in its decree, unquestionably that decree constitutes no bar to maintenance of the instant proceeding.

Yet under Kansas law a property settlement agreement effected by the parties to a divorce action is, unless it be attacked in such action by the parties themselves, bind-

ing and conclusive upon the divorce court which lacks jurisdiction to annul, modify, or disapprove the parties' own contractual division of property: *Petty v. Petty,* 147 Kan. 342, 76 P. (2d) 850; *Perkins v. Perkins,* 154 Kan. 73, 114 P. (2d) 804; see Colorado Supreme Court opinion, R. 430-433.

Necessarily, therefore, the Kansas divorce court's perfunctory "approval" of the instant settlement did not "adjudicate" the respective property rights of the parties or merge their contract into the decree of divorce—the court's nugatory approbation could not merge into its decree a private agreement it lacked power to reject, alter, or amend. *Per contra,* the parties by their contract withdrew the property division issue from the consideration of the divorce court and deprived it of all jurisdiction to adjudicate such issue. After the divorce decree, precisely as before, the property rights of the parties rested exclusively upon their own agreement: *Petty v. Petty, supra,* 147 Kan. 342, 76 P. (2d) 850; *id.,* 167 Kan. 510, 207 P. (2d) 428; *Hyde v. Hyde,* 143 Kan. 660, 56 P. (2d) 437; *id.,* 147 Kan. 134, 75 P. (2d) 1023; *Shaffer v. Shaffer,* 135 Kan. 35, 39, 10 P. (2d) 17; see Colorado Supreme Court opinion, R. 430-433. The inefficacy of the divorce court's "approval" of the settlement agreement becomes especially apparent when it is remembered that the court had before it no evidence regarding the extent or value of the Dickey's marital property (R. 10, 179-180; Colorado Supreme Court opinion, R. 424), and, therefore, could not possibly have determined whether or not the contract awarded an equitable division of such unknown property to Respondent. As Mr. Justice (later Chief Justice) Dawson wrote, in *Leslie v. Manufacturing Co.,* 102 Kan. 159, 162, 169 Pac. 193, of a comparable judicial "approval":

> "There was no judicial consideration of the matter at all in the city court—not even of the question whether the infant's interests were being protected by the agreement to which the city court was asked to give its judicial sanction. There was in fact no judgment in any proper sense, but merely a mumery of form in a vain endeavor to give some colorable judicial approval of the settlement."

While Petitioners point hopefully to an old (1931) Kansas decision in *Hullet v. Hullet*, 133 Kan. 738, 3 P. (2d) 470, rendered before the rule hereinbefore discussed had become crystallized in that state, and stress the fact that in the second *Petty v. Petty* decision (*supra*, 167 Kan. 510, 207 P. 2d 428) the *Hullet* opinion was paid the courtesy of sophistical distinction (instead of being unceremoniously overruled), the fact remains that the *Hullet* decision has never since been followed in Kansas and that the nonmerger rule laid down by the first *Petty* opinion (*supra*, 76 P. 2d 850) has been applied without exception by the Kansas courts and represents the law of Kansas.

Since, as the foregoing authorities establish, any action by Respondent to enforce her rights under the settlement contract must have been brought upon that agreement, not upon the divorce decree, it follows, conversely, that her instant action to avoid the unconscionable effects of that contract for fraud in its procurement is, perforce, an attack upon that agreement and not upon the judgment of divorce. Accordingly, the full faith and credit of that judgment was not involved in or denied by the Colorado decree. Squarely in point is *Schoonover v. Schoonover*, 172 F. (2d) 526 (C.C.A. 10).

In any event, it has already been demonstrated that by Kansas law Respondent's property rights did not merge

into the divorce decree. Inasmuch, therefore, as her present cause of action premised upon constructive fraud has never before been the subject of litigation in any court, the aforementioned want of merger is fatal to Petitioners' constitutional complaint—see *Magnolia Petroleum Company v. Hunt*, 320 U. S. 430, 439, 88 L. ed. 149:

> " . . . the clear purpose of the full faith and credit clause [is] to establish . . .that a cause of action merged in a judgment in one state is likewise merged in every other."

The mere fact, incidentally, that the Kansas divorce court chose to couple its ineffective "approval" of the settlement agreement with an "injunction" against violation of its terms cannot alter the determinative fact that Respondent's property rights are contractual, not decreed. The same want of jurisdiction to adjudicate the property rights as embraced in the agreement vitiates any attempt judicially to affect those private, contractual rights by injunctive pronounciamento. Completely irrelevant, too, is the doctrine (Pet. for Cert. 40-43) that litigants are estopped to attack decrees to which they have "consented". Respondent is not attacking the Kansas divorce decree; and the "consent decree" authorities could possess pertinency here only upon the erroneous assumption that by Kansas law Respondent's property rights became merged in the divorce decree and that her only remedy was to ignore the extinguished agreement and solicit vacation of the judgment. (It is, moreover, fundamental that a litigant may attack a consent decree if his consent was fraudulently obtained. In none of Petitioners' cited authorities did the unsuccessful litigant seek to impeach his "consent" on the ground of fraudulent procurement.)

In closing, it should be noted that Petitioners' basic error stems from the fallacious assumption that Respondent by her instant complaint asked the District Court of Denver County, Colorado, to redetermine the same issue —adequacy of the property division—already considered and adjudicated by the District Court of Sedgwick County, Kansas, and that the Colorado decision is essentially a finding that the Kansas court reached an incorrect conclusion (e. g., Pet. for Cert. 26, 32, 47-48). But we have hereinbefore demonstrated that the Kansas court had no jurisdiction to and did not adjudicate this issue; nor was it furnished with any evidence from which it might have drawn a conclusion as to the fairness of the property settlement.

Also, we are compelled to take issue with Petitioners' assertion that the Colorado district court held merely "that it is fraud in law for a man of the wealth of Mr. Dickey to give his wife the sum which she did receive under the property settlement" (Pet. for Cert. 16), and that the Colorado Supreme Court simply affirmed this theory of recovery (Pet. for Cert. 16, 30, 43-46, 46-48)— which, Petitioners suggest, is to convict Dickey of an anomalous type of fraud unknown to law.

Even a cursory examination of the Colorado Supreme Court opinion (R. 436-439) will reveal, however, that the court, after studiously examining the Kansas decisions, held Dickey guilty of the constructive (or "extrinsic") fraud of failing to perform his bounden duty of disclosing fully and completely the extent and value of the marital assets which the contract purports to divide.

By Kansas law assets accumulated during the marital relationship are, in divorce actions, treated as a species

of community property in which the wife has an inviolable interest: *Cummings v. Cummings*, 138 Kan. 359, 361, 26 P. (2d) 440; *Putnam v. Putnam*, 102 Kan. 47, 52-54, 177 Pac. 838; *Tobin v. Tobin*, 89 Okla. 12, 213 Pac. 884, 888-889. This rule is embodied in a statute (G. S. Kan. 1947 Supp., 60-1511, quoted in the Colorado Supreme Court opinion, R. 428-429) which requires that the wife be awarded "a fair and just division" of all such marital property—regardless, even, of her fault: *Holder v. Holder*, 143 Kan. 79, 53 P. (2d) 806; *Davison v. Davison*, 125 Kan. 807, 266 Pac. 650; *Leach v. Leach*, 46 Kan. 724, 27 Pac. 131.

A concomitant rule requires a husband, in negotiating a property settlement with his wife, to exercise the utmost good faith and to inform her fully and completely concerning the extent and value of the marital estate; and if the contractual provision made for the wife is disproportionate to the means of the husband, the Kansas law raises a presumption of fraudulent concealment and casts upon him the burden of proving affirmatively that he made the complete disclosure demanded of him by law or of suffering the vitiating consequences of "constructive fraud": *Watson v. Watson*, 104 Kan. 578, 180 Pac. 242, 244; *Cessna v. Cessna*, 155 Kan. 856, 130 P. (2d) 560, 563; *Shaffer v. Shafer*, 135 Kan. 35, 10 P. (2d) 17; *Pattison v. Pattison*, 129 Kan. 558, 283 Pac. 483; *Hoard v. James*, 119 Kan. 138, 237 Pac. 888. See, also, *Mann v. Mann*, 135 Okla. 211, 275 Pac. 348, 351. (The Oklahoma divorce statute—12 Okla. Stats. Ann. §1278, p. 179—is copied *verbatim* from G. S. Kan. 1947 Supp., 60-1511, *supra*, and Oklahoma and Kansas decisions construing and applying this mutual property division statute are interchangeably authoritative in both states, as was con-

ceded by Petitioners at page 62 of their original brief to the Colorado Supreme Court.)

Under Kansas law the award to Respondent of merely $250,000 out of marital property then worth between five and six million dollars (R. 79) was grossly inadequate and disproportionate as an inexorable matter of law: *Holder v. Holder*, 143 Kan. 79, 53 P. (2d) 806; *Mann v. Mann*. 136 Kan. 331, 15 P. (2d) 478. Hence, the aforementioned presumption of constructive fraud became operative in the case at bar; and, since Petitioners failed to demonstrate that Dickey made the requisite "full and complete disclosure", Dickey stands convicted by the instant record of constructive fraud. Furthermore, in our "Statement of the Case" we have hereinbefore demonstrated there was abundant affirmative proof of the fact that Dickey failed to make the full disclosure indispensable to defend the settlement contract against Respondent's attack.

The foregoing are the precise rules of Kansas law upon which the Colorado Supreme Court relied in concluding that Dickey was guilty of constructive fraud (R. 428-429, 436-437, 437-439), and its decision upon this issue is not only supported but compelled by the Kansas authorities.

Many additional arguments might be advanced to rebut Petitioners' assertion that the decision of the Colorado Supreme Court withheld from the Kansas divorce decree the faith and credit to which it was constitutionally entitled. (Respondent's briefs to the Colorado District Court alone consumed 162 pages, most of them devoted to this one point—R. 79.) In view, however, of the manifest infinality of the decree below we refrain from pursuing the issue further.

## F.

## CONCLUSION

It is submitted the decree of the Colorado Supreme Court is not "final" within the requirement of Section 1257 of the Code, and that, in any event, it is not violative of the full faith and credit mandate of the federal constitution. For either or both of these reasons it is submitted the petition for writ of certiorari should be denied.

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